Federal Communications Commission
445 12th St. SW ■ Washington, DC 20554
Tel.: (202) 418-1740 ■ FAX: (202) 418-2819

November 25, 2020

Lyle W. Cayce, Clerk
United States Court of Appeals
for the Fifth Circuit
Office of the Clerk
F. Edward Hebert Building
600 S. Maestri Place
New Orleans, LA 70130-3408

Re: *Huawei Technologies USA, Inc. et al., v. Federal Communications Commission, et al.*, No. 19-60896

Dear Mr. Cayce:

Respondents the Federal Communications Commission and the United States respectfully submit this response to the Court's November 10, 2020 Order.

Questions 1, 3 & 11. As an initial matter, if the Court determines that the challenge to the initial designation is unripe, the Commission believes the appropriate course would be to deem the USF Rule challenge unripe as well. Huawei's asserted harms stem from any final designation, not from an "abstract disagreement[] over the administrative polices" established in the USF Rule. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). And Huawei does not assert that it would continue with its challenge to the USF Rule if it prevails in the final designation proceeding.

Indeed, Huawei relies on its final designation comments to attack the reasonableness of *both* the USF Rule and the initial designation (Br. 13, 21, 46-47, 71-75, 77-80), but that material was submitted in a subsequent final designation proceeding. This Court must limit its review to "the administrative record already in existence" at the time the petition is filed, *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985), and is generally not "permitted to consider evidence outside the administrative record." *State of La., ex rel. Guste v. Verity*, 853 F.2d 322, 327 n.8 (5th Cir. 1988) (quoting *Camp v. Pitts*, 411 U.S. 138, 142–43 (1973)). Huawei would have a full and fair opportunity to present any subsequent evidence, and raise *all* of its other legal arguments, on appeal from any final designation order filed by the full Commission.[1] Waiting to hear those challenges together would preserve judicial resources, provide a reviewing court with a fuller record, and reduce the risk of inconsistent judgments in the event Huawei challenged any final designation order in a different court. *See Mount Wilson FM Broadcasters, Inc. v. FCC*, 884 F.2d 1462, 1466 (D.C. Cir. 1989) (unripe "appeal simply gives petitioners two possible bites at the same apple").

[1] The original deadline for the Commission to act on Huawei's administrative appeal of its final designation was November 27, 2020. The Commission later extended that deadline by two weeks to December 11. https://tinyurl.com/y6odgh75.

Apart from ripeness, the Commission has also shown that the Commission's initial designation of Huawei does not constitute final agency action and, therefore, Huawei's challenge to that designation should be dismissed for that reason as well. Gov't Br. 61-66.

Question 9. If the Court reaches Huawei's challenges to the USF Rule, it should conclude that the Commission had ample authority for that rule. The USF Rule does not authorize the agency to make free-wheeling national security determinations. Rather, it envisions a "targeted" and "specific, but important" role (*Order* ¶¶ 1, 4 (A2061)) for the Commission to evaluate how national security threats affect the "integrity of communications networks or the communications supply chain." 47 C.F.R. § 54.9(a). When the USF Rule mentions "national security," it envisions that the Commission will accord due weight to the national security judgments of other executive branch agencies, while bringing its own expertise to bear on how vulnerabilities in foreign equipment or services deployed in the United States could lead to the denial or disruption of service or theft of data in communications networks. *See Order* ¶¶ 5-17, 33, 41 (A2061-65, A2072, A2076).

As the Commission explained in its brief, the text and purposes of the Communications Act support the Commission's exercise of this limited role in

promoting "[q]uality services." *See* Gov't Br. 7-10, 33-42; *see also* 47 U.S.C. §§ 151, 254(b). If it were otherwise, Huawei's position would lead to an anomalous result: The Commission could defund insecure or low "quality" equipment originating in the United States, but would be forced to subsidize vulnerable equipment controlled by hostile foreign powers. Nothing in the Communications Act limits the Commission's universal service authority based on the origin of products or services in the networks.

Questions 5, 7. The Secure and Trusted Communications Networks Act of 2019, Pub. L. No. 116-124, 134 Stat. 158 (2020) (codified at 47 U.S.C. §§ 1601-1609) ("SNA"), did not divest the Commission of its preexisting authority to adopt the USF Rule.[2]

The SNA addresses a public policy issue that the FCC identified in the further notice of proposed rulemaking that accompanied the USF Rule: how to compensate the primarily rural carriers who choose to "rip and replace" insecure network equipment. The SNA creates a mechanism for the Commission to create a list of covered equipment and services that pose an unacceptable national security

[2] Consistent with this Court's case law, Respondents preserve their argument that a statutory argument raised for the first time in a reply brief is waived. *See Montgomery-Smith v. George*, 810 Fed. App'x 252, 256 & n.7 (5th Cir. 2020) (collecting authorities); *Dixon v. Toyota Motor Credit Corp.*, 794 F.3d 507, 508 (5th Cir. 2015).

risk to the United States, and to use that list as a basis to determine carrier eligibility for federal subsidies to "rip and replace" that equipment from their networks. SNA §§2, 3. The SNA creates a new fund to reimburse carriers who remove covered equipment, provides for carrier reporting on covered equipment to the agency, and establishes new enforcement mechanisms—all matters beyond the scope of the USF Rule. *See* SNA §§ 4-7. In so doing, Congress did not amend or modify Section 254 (the universal service statute) or indicate that it was narrowing the Commission's authority under that statute.

By enacting the SNA, Congress plainly confirmed the FCC's preexisting authority under the Communications Act. "A new statute will not be read as wholly or even partially amending a prior one unless there exists a positive repugnancy between the provisions of the new and those of the old that cannot be reconciled." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 664 n. 8 (2007) (quotation marks omitted); *see Columbia Gas Dev. Corp. v. FERC*, 651 F.2d 1146, 1158 (5th Cir. 1981) ("[R]epeals by implication are not favored, and the two acts or provisions thereof are to be given effect consistent with each other whenever possible."). There is no such positive repugnancy here; to the contrary, Congress was aware of the FCC's existing efforts to deny subsidies to networks that posed a security threat and built upon those efforts.

Indeed, Congress permitted the Commission to make use of the USF Rule it adopted under Section 254 in implementing the SNA. Section 3(b) of the SNA (codified at 47 U.S.C. § 1602(b)) directs the agency to issue rules banning the use of FCC-administered subsidies for "covered equipment" within 180 days of the SNA's enactment, and states that if the agency has previously "taken action that in whole or in part implements" that requirement, it "is not required to revisit such action" if "consistent" with Section 3.

The only "action" that the Commission could possibly have "taken" that was "consistent" with Section 3 was the November 2019 USF Rule. Indeed, the legislative history of the SNA confirms this reasonable inference. The bill that became the SNA was introduced in the House while the rulemaking at issue here was underway but before the USF Rule was adopted. *See* Secure and Trusted Communications Networks Act of 2019, H.R. 4998, 116th Cong. (Nov. 8, 2019). That bill stated that within 90 days "the Commission shall adopt a Report and Order in the matter of Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs (WC Docket No. 18–89) that implements" the funding prohibition in subsection 3(a). The savings clause that appears in the enacted version of section 3(b) was added to the SNA after the FCC adopted the USF Rule. *See* SNA § 3(b). The most logical conclusion is that

Congress envisioned the USF Rule as a potential means to implement the SNA "consistent" with that Act.

The fact that the SNA contained a provision that explicitly anticipated using the USF Rule, at least in part, to implement the SNA shows that the SNA is not "irreconcilable" or "repugnant" to the Commission's Section 254 authority. Congress adopted the SNA with full knowledge that the FCC was taking action to prohibit USF funding of national security risks, and section 3(b) preserves agency action consistent with the SNA. Section 3(b) would make no sense if Congress believed that the Commission lacked prior authority to adopt the USF Rule.

Moreover, nothing in the SNA purported to prevent the Commission from continuing to use its broader authority under section 254. The SNA is focused exclusively on potential national security threats. Section 254, by contrast, provides the Commission with broad authority to grant or deny USF funding based on a balancing of multiple statutory factors, among which is network integrity (under the rubric of "[q]uality services"). By providing an additional mechanism for executive branch actors to alert the Commission to specific products and services that should be excluded from USF programs for posing national security threats, the SNA did not disturb the Commission's prior authority to take network security into account in deciding how best to otherwise allocate USF funds.

Questions 4, 6. Indeed, the SNA constitutes a ratification of the Commission's USF Rule and initial designation of Huawei. As Chairman Pai said when the SNA was adopted, "[t]his new law ratifies the FCC's recently-adopted initiative to help small, rural telecommunications companies end their reliance on manufacturers that pose national security threats."[3] "Congress is presumed to be aware of an administrative . . . interpretation of a statute." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239 (2009), and here, Congress's awareness of and incorporation of the USF Rule into the SNA amounts to an "affirmative ratification of the administrative interpretations," *Bragdon v. Abbott*, 524 U.S. 624, 645-46 (1998).

The Supreme Court's decision in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), supports this conclusion. In *Brown & Williamson*, the FDA had for decades disavowed authority to regulate tobacco. Meanwhile, Congress passed six statutes addressing the problems of tobacco use, "persistently act[ing] to preclude a meaningful role for *any* administrative agency" in regulating tobacco. 529 U.S. at 157. The FDA then abruptly reversed course, interpreting its Act to grant authority. Under the circumstances, the Supreme Court found "it clear that Congress' tobacco-specific legislation has effectively ratified the FDA's

[3] https://tinyurl.com/y5z7jgrs.

previous position that it lacks jurisdiction to regulate tobacco." *Id.* at 156.

This case is precisely the opposite. There is no long-standing agency disavowal of authority or reversal of course. The agency has consistently made judgments that require considerations of national security, *see* Gov't Br. 7-9, and here the FCC properly read the Act to include authority to issue the USF Rule.

Soon after the Commission adopted the USF Rule, Congress adopted the SNA, with full knowledge of the Commission's ongoing work to promote network security. Section 3(b) of the SNA presupposes that the USF Rule was already valid and invites the Commission to use it to implement the SNA to the extent "consistent with" the SNA. The SNA also adopts a mechanism that resembles the designation process under the USF Rule—under which the Commission will exclude products and services from USF programs, following referrals from national security agencies or similar sources, that "pose[] an unacceptable risk to the national security of the United States." SNA § 2(b)(2)(C). Similar to *Brown & Williamson*, "Congress' [national security]-specific legislation has effectively ratified the [FCC]'s previous position," 529 U.S. at 156, that it had limited, but important, authority to protect network integrity from national security threats.

Congress's actions under the SNA also effectively ratified the Commission's initial designation of Huawei. Under section 2(c)(3) of the SNA, equipment

identified in the 2019 National Defense Authorization Act is covered by the SNA. SNA § 2(c)(3). Huawei equipment is identified in the 2019 NDAA, and this was a factor relied on by the agency in preliminarily designating Huawei under the USF Rule. Gov't Br. 16; *Order* ¶ 38 (A2075). The SNA thus requires the FCC to include Huawei in its funding prohibition. *See* H.R. Rep. No. 116–352, at 12 (2019) ("At a minimum, the Committee expects the initial publication of the list to include equipment and services produced or provided by Huawei Technologies Co. Limited"). These actions amount to a ratification of the USF Rule.

Questions 10, 11. Apart from ratification, Congress delegated to the Commission the authority, in the first instance, to determine whether its USF Rule was "consistent" with the SNA. Because the FCC is charged with implementing the SNA, *see, e.g.*, SNA §§ 2(a), 3(b), 4(a), courts ordinarily defer to the agency's reasonable interpretation of any ambiguous provision contained in the statute. *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 296 (2013); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 974 (2005) (deferring to FCC declaratory ruling under *Chevron*). This deference extends even to ambiguous provisions that could arguably be described as jurisdictional—such as section 3(b)'s instruction that the USF Rule may be used to implement the SNA only to the extent "consistent" with the statute. *City of Arlington*, 569 U.S. at 296.

In its July 17, 2020 *Declaratory Ruling*, which implemented section 3(b) of the Act, the Commission concluded that the USF Rule is "consistent" with the SNA. *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, 2020 WL 4046643 ¶¶ 20-22 ("*Declaratory Ruling*"). Under the Hobbs Act, which governs review of FCC decisions, this Court is precluded from reviewing or second-guessing that judgment in this appeal. But in any event, the judgment was reasonable and deserves deference.

The Hobbs Act required that any adversely affected party challenge the July 2020 Declaratory Ruling within 60 days of its publication. *See* 28 U.S.C. § 2344(1); *City of Arlington, Tex. v. FCC*, 668 F.3d 229, 237 (5th Cir. 2012). No party challenged the Declaratory Ruling, including Huawei (even though Huawei was aware of the proceeding and submitted comments in the docket). The 60-day limitation is jurisdictional and may not be waived. *Id*. Therefore, the agency's authoritative interpretation of the SNA—including its conclusion that the USF Rule is "consistent" with the SNA—is binding, and parties may not challenge it collaterally. *See* 28 U.S.C. § 2342(1) (court of appeal hearing Hobbs Act challenge "has exclusive jurisdiction to…determine the validity of...all final" FCC orders"); *S. Cent. Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n*, 744 F.2d 1107, 1114 (5th Cir.1984) ("the exclusive mechanism for obtaining judicial review of FCC action

is a direct appeal" under the Hobbs Act).

Having failed to challenge the agency's interpretation of the SNA in the *Declaratory Ruling*, Huawei may not now challenge that interpretation in this Court. *See US West Communications, Inc. v. Jennings*, 304 F.3d 950, 958 n.2 (2002) ("newly promulgated" regulation not under direct review "must be presumed valid for purposes of this appeal" under the Hobbs Act); *United States v. Stevens*, 691 F.3d 620, 623 (5th Cir. 2012) (permitting collateral attack on FCC orders in other cases would "circumvent the congressionally-mandated judicial review scheme and corresponding deadlines"); *Baros v. Texas Mexican Railway*, 400 F.3d 228, 237-38 (5th Cir. 2005) (interested party must "act affirmatively" and cannot "sit back and wait" and then "complain").

This result effectuates the channeling function performed by the Hobbs Act, which protects against the risk of inconsistent judgments in different courts of appeal on review of FCC orders. *See CE Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 450 (7th Cir. 2010) (Hobbs act "promotes judicial efficiency" and allows "uniform, nationwide interpretation" of the Act); *Bywater Neighborhood Ass'n v. Tricarico*, 879 F.2d 165, 169 (5th Cir. 1989). Under the Supreme Court's decision in *Brand X*, 545 U.S. at 682-83, the Commission's interpretation of ambiguous language in a statute it administers could still be entitled to deference in

other courts of appeals even if this Court were to adopt what it believed to be a better reading of the statute. The Hobbs Act protects against this possibility of inconsistent judgments.

In any event, for the same reasons that the SNA ratified the USF Rule, and at a minimum did not modify or amend the Commission's preexisting Section 254 authority (*see supra* pp. 7-10), the Commission's finding that the USF Rule and SNA are "consistent" is reasonable and deserving of deference. *See Declaratory Ruling* ¶¶ 20-22.

Huawei's attempts to manufacture inconsistency are unpersuasive. To be sure, the USF Rule covers "any equipment or services" produced by a covered company, 47 CFR § 54.9, while the SNA covers only equipment or service capable of certain functions or that "otherwise pos[e] an unacceptable risk to the national security of the United States," SNA § 2(b)(2)(C). But "the phrase 'consistent with' . . . does not require exact correspondence . . . but only congruity or compatibility." *Environmental Def. Fund v. EPA*, 82 F.3d 451, 457 (D.C. Cir. 1996). As the FCC explained, the USF Rule is "consistent" with the SNA, even if it is somewhat broader, because there is no conflict between the two. *Declaratory Ruling* ¶ 21 & n.44. Specifically, because any equipment banned by the SNA is also banned by the USF Rule, the USF rule serves to "implement" Section 3(a) of the SNA, even if

the USF Rule also depends on other, undisturbed statutory authority to reach other equipment. *Id.* (citing *Environmental Defense Fund*).

In addition, as a policy matter, the FCC's expert engineering judgment informed its conclusion that all Huawei equipment and services, even those not capable of certain data processing capabilities, poses a risk to network security and the supply chain. The FCC declined to limit its USF Rule to specific equipment precisely because it found, based on the record, that "a complete prohibition" was "the only reliable protection against potential incursions," and any costs were "outweighed by the need to ensure that the services funded by USF are secure and by the benefits to our national security and the nation's communications networks." *Order* ¶ 67 (A2087). The agency's extension of the USF prohibition to all equipment from covered companies is consistent with SNA section 2(b)(2)(C), which prohibits funding for products and equipment that "otherwise pos[es] an unacceptable risk to the national security of the United States or the security and safety of United States persons." In short, the USF Rule is compatible, and hence "consistent," with the SNA, because both aim to eliminate insecure products and services from American networks.

Question 8. Finally, while only Huawei can explain whether it intended to make a facial or as-applied challenge to the USF Rule, neither can succeed here

where the Commission, Congress, the President, and relevant executive branch agencies all agree the FCC should not subsidize network equipment and services that pose a national security threat. *See* Gov't Br. 46, 50-53.

Indeed, under the SNA—adopted by Congress and signed by the President—the FCC *must* prohibit USF funding to carriers who use Huawei products and services. Should this Court accept any of Huawei's challenges to the USF Rule, the principal effect on Huawei would be to invalidate any final designation order and permit funding to flow to carriers who use Huawei equipment and services for one fiscal year—the space of time between adoption of the USF Rule and rules implementing the SNA.[4] But that result would be perverse: It would negate the uniform judgment of Congress, the President, and responsible national security agencies on the potential threat posed by Huawei.[5] The USF Rule should be affirmed in all respects.

[4] On December 10, 2020, the FCC is scheduled to vote on an order further implementing the SNA. *See* https://tinyurl.com/y5fl3qf3 (draft order).

[5] **Question 2.** Respondents lodged the Classified Appendix that supported the Commission's initial designation of Huawei ex parte and in camera on or around June 9, 2020, to be transported to the Fifth Circuit's Clerk's Office through the Classified Information Security Officer to the Courts. Per discussions with the Clerk's Office, that Office has confirmed that these materials are available to the Court at the Court's request.

Respectfully submitted,

Sharon Swingle
/s/ Dennis Fan

Civil Division, Appellate Staff

U.S. Department of Justice
950 Pennsylvania Ave. N.W.
Washington, D.C. 20530

/s/ Thomas M. Johnson, Jr.
General Counsel

Ashley S. Boizelle
Deputy General Counsel

Jacob M. Lewis
Associate General Counsel

Matthew J. Dunne
Counsel

Federal Communications Commission
445 12th Street SW
Washington, DC 20554
(202) 418-1740

cc: counsel of record via CM/ECF